IVAN
RMAN

PRISON STUDY COMMITTEE
YALE LAW SCHOOL
NEW HAVEN, CONN.

STATE OF CONNECTICUT

December 3, 1956

ble Abraham Ribicoff
d, Connecticut

vernor:

ring the summer you appointed a special committee

) to ascertain the causes of unrest, other than those flowing from routine administrative activities, among the prison population of the State, and to recommend methods to alleviate those causes, if justice requires it;

) to consider the need, if any, for the establishment of a Department of Correction;

) to reappraise the prison building program previously formulated and approved;

) to examine other matters interrelated to the foregoing subjects.

e attached report, the First Interim Report of the Prison Study Committee, one of several which will subsequently be submitted to you. It deals e lack of uniformity of sentencing which is one of the sources of unrest hose confined in our correctional institutions, and more particularly, State Prison at Wethersfield and at the State Farm at Enfield. Since our nd recommendations on this subject have been completed, we submit the to you, appreciating, as we do, that while it has its own significance, ot the most important report which we shall prepare.

e difficulty of obtaining uniformity of sentencing will be apparent ne who gives even the most cursory thought to the problem. Judges with backgrounds think differently. What may appeal to one as a proper sen- ill seem to another to be either inadequate or oppressive. The result there are many instances where the sentence of a convicted person is out of line with those customarily imposed. The problem is not how to uniform sentences but how to develop a uniform set of principles for sen- and to insure the application of these principles throughout the State. blem is present and justice demands that an effort be made to meet it.

PRISON STUDY COMMITTEE
YALE LAW SCHOOL
NEW HAVEN, CONN.

STATE OF CONNECTICUT

December 3, 1956

Honorable Abraham Ribicoff
Hartford, Connecticut

Dear Governor:

During the summer you appointed a special committee

(1) to ascertain the causes of unrest, other than those flowing from routine administrative activities, among the prison population of the State, and to recommend methods to alleviate those causes, if justice requires it;

(2) to consider the need, if any, for the establishment of a Department of Correction;

(3) to reappraise the prison building program previously formulated and approved;

(4) to examine other matters interrelated to the foregoing subjects.

The attached report, the First Interim Report of the Prison Study Committee, is but one of several which will subsequently be submitted to you. It deals with the lack of uniformity of sentencing which is one of the sources of unrest among those confined in our correctional institutions, and more particularly, in the State Prison at Wethersfield and at the State Farm at Enfield. Since our study and recommendations on this subject have been completed, we submit the report to you, appreciating, as we do, that while it has its own significance, it is not the most important report which we shall prepare.

The difficulty of obtaining uniformity of sentencing will be apparent to anyone who gives even the most cursory thought to the problem. Judges with varying backgrounds think differently. What may appeal to one as a proper sentence will seem to another to be either inadequate or oppressive. The result is that there are many instances where the sentence of a convicted person is grossly out of line with those customarily imposed. The problem is not how to achieve uniform sentences but how to develop a uniform set of principles for sentencing and to insure the application of these principles throughout the State. The problem is present and justice demands that an effort be made to meet it.

Honorable Abraham Ribicoff

Our efforts have led to the proposal contained in the attached report. Briefly, we propose the establishment of a review division of three Superior Court judges to review the sentence of any person who claims to be aggrieved by a sentence imposed by the Superior Court. Every person sentenced will be notified of his right to review and that review may result in an increase as well as decrease of sentence. Reasons for each decision of the review division will be published.

This proposal not only has the unanimous support of members of the Prison Study Committee but also, we are advised, has the approval of the Connecticut Judicial Council.

We therefore respectfully submit the First Interim Report of the Prison Study Committee.

Sincerely yours,

PATRICK B. O'SULLIVAN

Chairman, Prison Study Committee

FIRST INTERIM REPORT OF THE GOVERNOR'S PRISON STUDY COMMITTEE

- State of Connecticut -

19 November 1956

A PROCEDURE FOR REVIEWING SENTENCES

I. The Problem

The morale of many prisoners, and consequently their incentive for rehabilitation, is adversely affected by the belief that there is wide inequality in the sentences imposed by different judges for the same crime. Wardens and penologists appear to be in complete agreement that this is a real problem.[1] Governor Ribicoff, at his first meeting with the Committee, said that he believed the problem exists at Wethersfield. This was confirmed by a state parole officer who reported that "All prisoners bear a certain grudge against the sentencing judge, but the hardest ones to work with are those who, after asking around and comparing, decide that their sentences represent a particular judge's harsh treatment."[2]

Although one of the purposes of this Report is to present evidence on the absence of uniformity in sentencing in this and other jurisdictions, the ultimate reliability of this evidence, even if uniformity could be measured, is not the key issue. As long as a prisoner feels that he has been denied review of a sentence which he deems unfair or unduly harsh he remains a source of trouble in the prison system and efforts toward rehabilitation are seriously impeded. The Report next examines current Connecticut procedures for reviewing "excessive" sentences. Finally it surveys the procedures of other jurisdictions and proposes that the Massachusetts procedure, providing review of sentences by a panel of three trial court judges, be adopted. Draft legislation to implement the proposal accompanies the Report.

II. Variations in Sentences for the Same Crime

Studies comparing the sentencing records of judges to determine the

extent of uniformity of sentencing for the same crime must be used with caution. This is because "uniformity" in sentencing is neither uniformly defined nor subject to a simple enough definition to be readily measurable. If each judge in a given jurisdiction prescribed the same sentence for every individual convicted of larceny, a straight tabulation might lead one to conclude that sentencing is "uniform". But if one could and were to take into account the extent of complicity in the crime, criminal record, degree of co-operation with the prosecution, and demeanor before the sentencing judge, a comparison of the same set of sentences would reveal wide "inequality". In a straight tabulation it is assumed that such variables will average out in a large sample of sentences. In the more selective studies which compare sentences by crime and prior record it is assumed that the judge actually bases his decision on these variables. Both assumptions are questionable.

But, however doubtful the statistical reliability of these studies, it cannot be overemphasized that they reveal a picture of sentencing that many prisoners share and act upon. It is for this reason that the results of these studies are described.

A. Other Jurisdictions

A straight tabulation of 7,442 sentences imposed by 6 New Jersey county judges over a 9 year period disclosed a wide gap between Judge A and Judge F in the length of sentences imposed and the percentage of fines, suspended sentences and probations granted. The judges maintained their relative positions on the scale of severity for most types of crimes. Judge B, for example, imposed penal sentences in 93% of the crimes against property accompanied by violence, while Judge F imposed sentences in only 37% of such cases.[3]

An analysis of case histories of the 1,661 persons committed to Massachusetts State Prison during a 5 year period found that at least 20%

had received sentences based upon "considerations not pertinent to the facts of the complete social history".[4] It was found, for example, "that no fewer than thirty-four different sentences were imposed upon similar criminals for similar crimes; while seventeen similar sentences were imposed upon different criminals for similar crimes".[5]

The American Bar Association Committee on Sentencing, Probation, Prisons, and Parole, in its 1939 Report, discussed the findings of a U. S. Department of Justice study of the views of 270 federal and state criminal court judges. It concluded that "the sentencing records of many judges, as well as the judges' own statements concerning their sentencing practices, show the presence of arbitrary variance and numerous highly subjective factors and personal biases in the imposing of sentences".[6]

B. Connecticut - Wethersfield

Our pilot investigation of 200 active files, selected at random from more than 800 at Wethersfield, reveals a marked variation in the sentences of prisoners who have substantially similar backgrounds and have been convicted of the same offense.[7] This is illustrated by the variations which appeared in sentences for robbery with violence which carries a statutory maximum of 25 years. Among prisoners with a record of more than 1 major offense, sentences range from a low of 8 to 12 to a high of 15 to 22 years. Among prisoners with a record of only minor offenses, sentences range from a low of 1 to 3 years to highs of 10 to 12 and 8 to 15 years. Among prisoners with no record of prior convictions, sentences range from a low of 1 to 3 to a high of 8 to 12 years. It should be noted that the high sentences for both minor offenders and offenders with no criminal record are as great or greater than the low sentence for major offenders. While these figures may suggest a logical basis for discontent among minor offenders and those with no record, there is no reason to assume that the major offender logically restricts

his comparisons to other major offenders. The prisoner with 15-22 years for robbery with violence may not draw statistical refinements in sketching his picture of justice.[8]

These figures suggest a related problem which will be dealt with in another report. Indeterminate sentence provisions contain no limitations on the minimum sentence accompanying a given maximum sentence selected by the judge. A prisoner becomes eligible for parole only after he has served the minimum sentence. Thus not only is the Parole Board's discretion greatly reduced when the gap between minimum and maximum is as little as two years, for example in a sentence of 8 to 10 years, but the prisoner's incentive to rehabilitation is less than it might well be were the sentence 1-10 years. Furthermore, from the prisoner's viewpoint a 5-15 year sentence may prove to be far less severe than an 8-10 year sentence.[9] No matter how this problem may be resolved, the desirability of providing review for "excessive" sentences remains.

III. Connecticut Procedures for Review of "Excessive" Sentences

What legal recourse is available to the prisoner in Connecticut for review of his sentence? There are, theoretically, only two avenues of appeal -- one to the Board of Pardons, the other to the Supreme Court of Errors.

A. Board of Pardons

Section 3020 of the General Statutes provides the Board of Pardons with jurisdiction to grant commutations of punishment to any person confined in the State Prison. The Board has the authority to grant a pardon "at any time after the imposition and before or after the service of any sentence". However, such power is primarily exercised in commutation of death penalties. In the rare instances when the power is used to reduce a sentence, action is taken only after the prisoner has served a major

portion of his minimum term.[10] In the 200 active files examined at Wethersfield there was only one commutation of a term sentence to a lower minimum.[11] Because this procedure is so sparingly used and seldom becomes available before a substantial period of a sentence has been served, it reinforces a prisoner's feeling that he has no immediate or adequate opportunity to have his "excessive" sentence reviewed.

B. Supreme Court of Errors

Appeal from an "excessive" sentence to the Supreme Court of Errors has proved even more unavailing. That court has consistently held that it cannot disturb a sentence unless the trial court has abused its discretion.[12] This has meant that as long as a sentence falls within the maximum term allowed by statute, it must stand.[13]

IV. Possible Solutions

A comparative study of legislation suggests consideration of the following three tribunals as possible forums for feviewing and modifying sentences: (A) Adult Authority Board composed of law and social science trained personnel (B) The Supreme Court of Errors (C) A Review Division of Trial Court Judges.

A. Adult Authority Board

In 1944 the California legislature established an Adult Authority Board to fix sentences. It is composed of persons experienced in the fields of corrections, sociology, law, law enforcement and education. The trial judge has no sentencing discretion; he sentences a defendant to the term prescribed by law. The Board determines, and may redetermine, "what length of time, if any, such person shall be imprisoned" and to what institution he will be sent. In making its determination, the Board examines material concerning the prisoner, gathered during his first six months of

of imprisonment (or 90 days in less serious crimes). The Board also has discretion to release prisoners to parole camps or to the community under parole.[14]

Thus the Board has continuous supervision over the disposition and treatment of an offender from conviction through parole. This continuing relationship is aimed at producing, among other things, sounder and more uniform sentencing practices. Under such a system, "uniformity" means as complete individualization of treatment as possible for each prisoner and not necessarily equal time for equal crimes and prison records.

Though the Adult Authority has much to recommend its adoption, there is little reason for suggesting that it would resolve the problem of a prisoner feeling that he has no way of having an "excessive" sentence reviewed. The only review, if any, is a redetermination by the same Board. Furthermore the diversity of interests represented by various disciplines on the Board may well result in arbitrary or excessive action. Thus, even if such a Board were to be established, the desirability for a reviewing agency would remain.[15]

There is a more fundamental reason for not recommending an Adult Authority with powers as broad as those granted the California Board. We do not accept the simplistic view that the only purpose of sentencing is rehabilitation of the individual offender. Deterrence of others through punishment and prevention through restraint are also important goals of the criminal law. This complex of objectives, including rehabilitation, seems best suited to an initial adjustment by judicial action in the sentencing process. We are not prepared therefore to propose that the discretion of the trial judge in the imposition of sentences be abolished.

There is, however, a place for an Adult Authority Board in a modern correctional scheme. In fact, since the primary emphasis of such a Board

is on classification and treatment of the criminal in a proper institution rather than on the number of years he is to serve, it presupposes an adequate statewide department of correction with a classification center and various outlets for the treatment of different types of offenders. Connecticut is without such a department. In a report devoted to a department of correction the function and limits of power of an Adult Authority will be discussed.[16]

B. Supreme Court of Errors

In some jurisdictions sentences have been reduced on appeal in the absence of express statutory power. The reasoning in these cases generally proceeds on the theory that an abuse of discretion by the trial court in judging the term necessary to vindicate the law is an error of law reviewable on appeal. Since that interpretation has been rejected by the Connecticut Supreme Court,[17] only an express statutory grant to modify sentences or remand for modification could provide a defendant with such a review. This has been done in Iowa and has been adopted by the American Law Institute in its Code of Criminal Procedure.[18]

In theory, this procedure allows the defendant to use traditional channels of review to press his claim of undue severity and enables a single reviewing body to develop a statewide sentencing policy to guide the lower courts. In practice these advantages have not been realized. Resort to appeal is apparently greatly limited by the costly and cumbersome nature of the process. The number of modifications noted in the few cases recorded seems to suggest that the appellate court, in most jurisdictions, continues to extend judicial courtesy to the discretion of the trial judge. Moreover, with few exceptions, the high courts have not used this review as a means of establishing criteria for sentencing. Decisions often con-

tain a statement such as "the sentence is being reduced under all the circumstances" or "on the entire record". Whatever factors were considered material to the decision are not articulated.[19] Since traditional appellate review, has not in practice, resolved the problem solved in theory, it is not recommended that the Supreme Court of Errors become Connecticut's forum for review of sentences.

C. Review Division of Trial Court Judges

In 1943, Massachusetts established an appellate division consisting of a rotating panel of three trial court judges, to review cases in which a defendant is "aggrieved" by his sentence.[20] The legislature acted in response to Judicial Council criticism of an appellate procedure very similar to that in Connecticut. The Council reported that appellate power had been restricted to a literal interpretation of error and that there was no check on abuse of discretion if the trial judge sentenced within the legal maximum. The Council recommended, as do we, a statutory opportunity for summary review of sentences which would not burden the Supreme Judicial Court (in Connecticut, the Supreme Court of Errors) and which would not place upon a defendant the expensive and cumbersome procedure of appealing to that court.[21]

The Massachusetts statute provides in pertinent part:

> There shall be an appellate division of the superior court for the review of sentences to the state prison imposed by final judgments in criminal cases, except in any case in which a different sentence could not have been imposed,...Said appellate division shall consist of three /trial/ justices of the superior court...designated...by the chief justice of said court, and shall sit...at such...place(s) as may be designated by the chief justice, and at such times as he shall determine. No justice shall sit or act on an appeal from a sentence imposed by him. Two justices shall constitute a quorum to decide all matters before the appellate division.
>
> A person aggrieved by a sentence which may be reviewed may within three days after the date of the imposition...file...a request for leave of the justice who imposed the sentence to appeal to the appellate division

for the review of such sentence....the clerk of the court shall notify the person sentenced of his right to request such leave. If such leave to appeal is not granted within ten days after such request, the person sentenced shall forthwith be notified by the clerk of his right to request said appellate division within ten days for leave to appeal for the review of such sentence. The justice imposing the sentence may grant such leave at any time before the request to the appellate division is considered. Whenever leave to appeal is granted the defendant shall be notified by the clerk,...Said division may for cause shown consider any late request for leave to appeal filed within one month from the imposition of sentence and may grant such leave. A request for leave to appeal or an appeal shall not stay the execution of a sentence....The justice may transmit to the appellate division a statement of his reasons for imposing the sentence and shall make such a statement within seven days if requested to do so by the appellate division.

If leave to appeal is granted...the appellate division shall have jurisdiction to consider the appeal with or without a hearing, review the judgment so far as it relates to the sentence imposed, and also any other sentence imposed when the sentence appealed from was imposed,...and shall have jurisdiction to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences or any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review, but no sentence shall be increased without giving the defendant an opportunity to be heard. /Note: Providing the division with power to increase sentences was intended to discourage frivolous appeals./ If the appellate division decides that the original sentence or sentences should stand, it shall dismiss the appeal. Its decision shall be final....

Statistics indicate that this procedure affords a real opportunity for review and modification without placing an unduly heavy burden on the court. In 1943-44, 37 defendants filed appeals, 8 sentences were reduced, none increased and 19 appeals were dismissed. The division of three judges disposed of the appeals in 6 days. By 1951-52, 217 appeals were filed, 42 sentences were reduced, 5 increased and 166 appeals dismissed. The division sat 18 days during that year. In the last report for 1954-55, 290 appeals were filed, 66 sentences were reduced, 1 increased and 165 appeals dismissed in 19 days' sitting.[22]

This procedure, in theory and in practice, provides the offender with immediate and effective opportunity to seek review of his sentence. He may enter the crucial first stage of prison life with at least one less grievance and with a feeling that his sentence does not represent the bias

and prejudice of a single judge. The relatively high percentage of modifications indicates more than a cursory review. It also reflects a spirit of self-criticism which, together withthe appellate division's power to require an explanation for the sentence, must force all trial judges to weigh carefully available data on a prisoner before imposing sentence. Such a procedure in Connecticut would promote the use of the new adult probation pre-sentence reports;[23] and thereby tend to reduce inequalities in sentencing.

The Committee, in proposing the adoption of the Massachusetts procedure, recommends that the Connecticut statute contain provisions for:

1. A 30 day period during which an application for review may be made. The purposes of this increase from 3 to 30 days is to provide the convicted person with sufficient time to to decide whether to seek review following the shock of conviction and beyond the 14 day period, during which a regular appeal may be taken.[24] This change eliminates the 30 day period during which a review application late "for cause" may be had.
2. Clear written notice to each convicted person of the right to apply for review and of the risk of an increase of sentence on review. The Committee considered and decided that an increase in sentence by the review division would not give rise to a valid claim of double jeopardy. This problem is discussed in the Appendix.
3. Publication of the decisions of the review division in the Connecticut Supplement.[25] Without such a provision it is difficult, if not impossible, to determine the basis for modification of sentence or dismissal of an application for

review, and the opportunity to provide a guide to sentencing is lost. To be fully effective, the procedure should enable the trial judge to examine review decisions to determine, forexample, what factors his brothers weigh most heavily in sentencing.

The Committee considered and decided against making hearings mandatory in all applications for review, not only when sentences are increased. It was felt that summary review would be less costly and cumbersome for the convicted person and that a hearing requirement might so increase the burden of the review division that grants for leave to review might be too greatly restricted.

V. Conclusion

Any consideration of sentencing reform should take into account the present limitations of Connecticut's correctional organization and facilities. Even if some form of disposition tribunal integrated in a department of correction is ultimately deemed necessary, the review division solution which is here proposed would still be necessary though it might require amending. In any event it would answer the immediate problem of prisoner attitudes toward the sentencing tendencies of individual judges and encourage the use of present institutional facilities, such as the adult probation report program, in the sentencing process. At the same time it should serve as a step toward educating the public to accept more modern treatment methods. Thus in order to reduce the inequalities and lack of consistency in sentencing policy, the Committee recommends that this Report and the following draft legislation establishing a review division of superior court judges be submitted to the General Assembly of Connecticut.

AN ACT ESTABLISHING PROCEDURE FOR REVIEW OF SENTENCES IMPOSED BY THE SUPERIOR COURT

Section 1. The chief justice shall appoint three judges of the superior court to act as a review division of said court, and shall designate one of such judges as chairman thereof. The clerk of the superior court for Hartford county shall record such appointments and shall give notice thereof to the clerk of said court for each other county. The review division shall meet at such times and places as its business requires, as determined by the chairman. No judge shall sit or act on a review of a sentence imposed by him. The decision of any two of such judges shall be sufficient to determine any matter before the review division. In any case in which review of a sentence imposed by any of the judges serving as the review division is to be acted on by the division, the chief justice may designate another judge to act in place of such judge.

Section 2. Any person claiming to be aggrieved by a sentence to a term of imprisonment by the superior court may, within thirty days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the superior court for the county in which the judgment was rendered an application for review of the sentence by the review division. Upon imposition of the sentence, the clerk shall give written notice to the person sentenced of his right to make such a request. The notice shall include statements that review of the sentence may result in suspension of sentence, probation, decrease of minimum and/or maximum terms or an increase of the minimum and/or maximum terms within the limits fixed by law and that no such increase in sentence will be imposed without a hearing. A form for making such application shall accompany the notice. The clerk shall forthwith

transmit such application to the review division and shall notify the chief justice and the judge who imposed the sentence. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven days if requested to do so by the review division. The filing of an application for review shall not stay the execution of the sentence.

Section 3. The review division shall, in each case in which an application for review is filed in accordance with section 2 of this act, review the judgment so far as it relates to the sentence imposed, and any other sentence imposed on the person at the same time, and may order a different sentence or sentences to be imposed, which could have been imposed at the time of the imposition of the sentence under review, or may decide that the sentence under review should stand. No sentence shall be increased unless the person sentenced has been given an opportunity to be heard by the review division. If the review division orders a different sentence or disposition of the case, the court sitting in any convenient county shall resentence the defendant or make any other disposition of the case ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on any substituted sentence. The decision of the review division in each case shall be final. The reasons for each decision shall be stated therein. The clerk of the superior court for the county in which the review division is meeting shall act as the clerk of the division and shall send ~~a copy~~ the original and a copy of each decision to the chief justice, the judge who imposed the sentence reviewed, the clerk of the court for the county where the judgment was rendered, the person sentenced, the principal officer of the penal institution in which he is imprisoned and the reporter of judicial decisions, who shall cause it to be published

in the Connecticut Supplement. The ~~supreme court of errors~~ review division may require the production of pre-sentence reports and any other records, documents, exhibits or other thing connected with review proceedings.

Section 4. The superior court shall prescribe forms to be used in accordance with section 2 of this act and make rules for procedure under sections 2 and 3.

FOOTNOTES

1. See, e.g., Warner, S. B. and Cabot, H. B., "Judges and Law Reform" (Cambridge - Harv. Univ. Press, 1936); Dession, G. H., "Justice After Conviction" 25 Conn. Bar Journal 215 (1951); Barnes, H. E. and Teeters, N. K., "New Horizons in Criminology" p. 333 (1943); Ashe, S. P., "A Warden's View on Inequality in Sentences", 5 Federal Probation no. 1, p. 26 (1941); and McGuire, M. F. and Holtzoff, A., "The Problem of Sentence in the Criminal Law", 4 Federal Probation no. 4., p. 20 (1940).
2. For a Wethersfield prisoner's view, see letter of LeRoy Nash, #15725, dated Aug. 23, 1956 in which he states "Make it required that either the Board of Pardons or some other Board adjust inmate's minimum sentences so that inequities or inequalities of time actually to be served before meeting the Parole Board can be eliminated...instead of one man having to wait for 10 or 15 years or more before he can apply for a parole consideration, while another man confined for a very similar crime, under the same law, will go up for parole in a year or two."
3. Gaudet, F. J., "Individual Differences in the Sentencing Tendencies of Judges", Archives of Psychology, no. 230, pp. 21-30 (1938).
4. Lane, H. E., "Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison", 32 Journal of Criminal Law and Criminology, p. 171 (1941).
5. id at 184.
6. American Bar Association - Section of Criminal Law. Program and Committee Reports, July 1939. Report of the Committee on Sentencing, Probation, Prisons and Parole; Wayne Morse, chairman. See also

statement by Warren Olney III (Assistant Attorney General, Criminal Division, Department of Justice): "With all the protestations by federal judges for the need of fairness in dealing with those accused or convicted of crime it seems strange to find that what is probably the greatest weakness in the administration of criminal justice in the courts of the United States lies in an area which is at present within the exclusive control and power of the federal judges. I refer to the sentencing procedures in the federal courts and to the unfairness and injustice arising from the wide disparity in the sentences meted out by the federal judges themselves to those convicted of violating the laws of the United States." (p. 10, mimeo release of address, "Some Long Term Projects in the Federal Department of Justice", delivered on Sept. 20, 1956 before the University of California Law School Association).

7. It is difficult to make more than a rough approximation of criminal backgrounds for comparative purposes. These elements were taken into account: number of prior convictions, type of prior offense by similarity with present crime and degree of criminality, that is, felony or misdemeanor, and lapse in time since last conviction. Data was obtained from active file summaries at the prison.
8. Although the incidence of sentences for other crimes in the sample was limited, there is no reason to believe that similar variance is not present in all categories of crime. Among six prisoners convicted of manslaughter with no prior record, sentences range from a low of 1-3 to a high of 12-15 years.
9. Some jurisdictions have resolved this problem by legislation specifying that the court shall sentence to the minimum and maximum pro-

vided by law for the particular crime. While this eliminates any possibility of a court-imposed narrow gap between minimum and maximum terms, it deprives the sentencing judge of all discretion in determining the sentence. The desirability of this latter result should be considered in any study of revising the Connecticut indeterminate sentence provisions.

10. Information on the practices of the Board of Pardons was obtained in a discussion with a member of the Board.

11. The absence of commuted term sentences in the records does not necessarily imply that the Pardons Board never exercises this power. Not included are prisoners paroled directly upon the recommendation of the Pardons Board.

12. See State v. Horton, 132 Conn. 276, and cases cited therein, 278 (1945); State v. LaPorta, 140 Conn. 610, 612 (1954).

13. Connecticut's position is that of a majority of jurisdictions including the federal courts.

14. See Cal. Penal Code Sections 1168, 2792 (Deering, 1949); Section 3020 et seq., Section 5075 et seq. (Deering, 1955 Supp.).

15. California has no statutory provision for judicial review of the sentences fixed by the Adult Authority Board.

16. See Report to the Judicial Conference of the Committee on Punishment for Crime, p. 1 (1942); "...The Committee recommends that in the first instance the court shall sentence the offender to imprisonment generally, which shall be for the maximum term prescribed by law, the effect being the imposition of a sentence exceeding 1 year but not more than the maximum term prescribed by law; that the offender shall thereupon begin service of his sentence; that in the first

months of histerm, a board of corrections, upon the basis of a thorough study of the offender in the institution, shall report to the trial court the sentence which it would regard as most suitable for the offender; that thereupon the trial court giving to the report such weight as it may deem proper shall determine the definite sentence within the maximum prescribed by statute." See also Report, supra, pp. 23-30.

17. See cases cited in note 12 supra and Note, 42 Yale L. J. 453 (1933).

18. See Iowa Code Section 14010 (1931); A. L. I. Code of Criminal Procedure Section 459(2) (1930).

19. For excellent analysis of appellate review and reduction of sentences, see Hall, L., "Reduction of Criminal Sentences on Appeal: I, II", 37 Col. L. Rev. 521, 762 (1937).

20. Ann. Laws of Mass., C. 278, Sec. 28A-Sec. 28D (1943).

21. See 28 Mass. L. Q. no. 1, p. 28 (1943).

22. The totals for each year are completed by the number of appeals withdrawn and those still pending at the end of each year. See Reports of the Massachusetts Judicial Council in the December issue of the Massachusetts Law Quarterly for these years.

23. See Conn. Gen. Stats. Section 3337d (1955 Supp.). An Adult Probation Officer in discussing this new legislation reported that some judges gave considerably more weight than others to the pre-sentence report as a factor in sentencing.

24. See Section 378 Conn. Practice Book (1951).

25. Conn. Gen. Stats. Sections 1643-1645 (1949 Rev.); Sections 1008d-1011d (1955 Supp.).

APPENDIX

Re: the problem of double jeopardy and the Massachusetts procedure for reviewing sentences described and proposed in the First Interim Report of the Prison Study Committee.

I

Introduction

Chairman O'Sullivan, commenting on the proposal that Connecticut adopt the Massachusetts system of reviewing sentences, wrote: "I am somewhat concerned...with the possible claim of double jeopardy, as that claim might be raised upon the increase of sentence by the reviewing board." The Committee considered the problem and, for the reasons set forth below, concluded that such a claim would not be valid.[1]

Though Connecticut is one of five states which has no double jeopardy guarantee in its constitution and though the double jeopardy clause of the Fifth Amendment of the Constitution of the United States has been held not to apply to state proceedings,[2] the rule is well established in the case law of the State.[3] The possibility of increased sentences under the proposed review procedure will therefore be considered in the light of the objectives of the double jeopardy rule and of the legal precedent which has developed.

II

Double Jeopardy Rule -- Its Objectives and Underlying Policy

The Fifth Amendment to the Constitution of the United States provides, in part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb...."

It is generally agreed that this prohibition means that no person will be harassed by successive prosecutions or punished more than once for a

single criminal activity.[4] This is frequently restated in terms of protecting the accused against state action which might result in conviction and sentence for more than one violation of the substantive law when only one exists; the expense and time of trying, in a new and independent case, previously adjudicated issues; and the stigma of repeated criminal prosecutions.[5] The policy underlying these objectives seems to be that an accused in a democratic society, once acquitted or convicted, should be able to regain that feeling of security about the future essential to planning one's life. He must know that the state can no longer reopen the matter.[6]

Since review can only be had upon application by the convicted person within a specified period and since the state cannot ~~participate in~~ initiate hearings to consider an increase in sentence, the proposed procedure does not conflict with either the objectives or underlying policy of the double jeopardy rule. Repeated prosecutions and penalties for the same offense cannot result from any action by the state prosecutor or, for that matter, by the prisoner. Uncertainty about the future, so far as it may affect the plans of the prisoner, is far less and for a shorter period than the uncertainty which accompanies most review proceedings. Despite the absence of policy conflict, the question remains whether the courts have established precedent which might treat an increase of sentence under the proposed procedure as a second punishment for the same offense and thus as a violation of the double jeopardy doctrine.

III

Double Jeopardy Doctrine -- Judicial Interpretation

The outcome of a double jeopardy plea is, as a recent Comment in the Yale Law Journal demonstrates, "highly unpredictable. Not only are the precedents confused, but it is difficult to forsee whether in a given case

a court will apply the old rules mechanically or will attempt to improvise."[7] With this warning, the "old rules" will be examined in relation to the contention that an increase in sentence inflicts a second punishment on top of the one imposed at trial and as a result two penalties are levied for the same offense.

The United States Supreme Court confronted, but did not decide, a parallel issue in Roberts v. U. S.[8] The trial court, after sentencing the accused to two years in a federal penitentiary, suspended sentence under the authority of the Federal Probation Act. Four years later, following a hearing, the court revoked probation, set aside the original two year sentence and imposed a new sentence of three years. A majority of the Court found that an increase in sentence was not authorized by the statute and expressly found it unnecessary to answer the double jeopardy question. But in a dissent which found authority in the Act for increasing sentences, Justice Frankfurter declared that it "does not offend the safeguard of the Fifth Amendment against double punishment..../T/hat Amendment guarded against...trying a man twice in a new and independent case...or punishing him for an offense when he had already suffered the punishment for it." He said of probation, as one might of the review proposal,: "It would be strange if the Constitution stood in the way of a system so designed for the humane treatment of offenders."[9]

Dictum from a prior decision of the Court might be read to cast doubt upon the dissenters' view that the Fifth Amendment would not invalidate a statutory procedure just because it authorized an increase in sentence. In U. S. v. Benz[10] the Court, applying the general rule that orders of a court remain within the control of the court during the term at which they are made and are thus subject to modification, held that a Federal District Court has power to amend a sentence by reducing it during the term in which

it was imposed, even after a part of the sentence has been served. Citing Ex parte Lange,[11] the Court added, without formally deciding, that the rule applies "provided the punishment be not augmented."[12]

An examination of Lange does not support the dictum. There the offender was sentenced to one year imprisonment and to a fine of $200 under a statute which authorized imprisonment for not more than one year or a fine of not more than $200. Five days after imprisonment had begun and the fine had been paid, Lange was brought before the same court, an order was entered vacating the former judgment as exceeding statutory authority, and he was again sentenced to one year imprisonment, from the date of the new order. This meant that Lange would have served one year and five days when only one year was authorized by statute. The Court said: "...can the /trial/ court vacate that judgment entirely, and without reference to what has been done under it /serving five days/, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense."[13] Thus even if the double jeopardy clause of the Fifth Amendment, as construed in Lange, were controlling in Connecticut, and it is not,[14] a claim of jeopardy would fail on a sentence increase so long as the reviewing panel credited the offender with whatever part of the sentence he had served. Of course no sentence would be valid if it were increased beyond that authorized by statute for the particular offense.[15]

Moreover, even if the unqualified statement in Benz were correct and controlling, the review procedure proposed would not be subject to attack, because of the rule that "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial."[16] This has meant, for example, that if an accused succeeds in obtaining review of a conviction for second degree murder and a life sentence, he

may on retrial be convicted of first degree murder and be sentenced to death.[17] The increase in sentence which results cannot be the basis of a claim of double jeopardy, for the defendant's action in seeking review is said to constitute a waiver.[18] Such a claim following increase of sentence under the proposed procedure would be even weaker. Not only is the convicted person the only party authorized to initiate review, but also any increase in sentence could never be as great as that possible upon a new trial for a greater offense.

Finally, if the proposed procedure authorized the State to initiate review of a sentence, it is doubtful if a claim of double jeopardy would succeed. Since 1886, Connecticut has been among a still small minority of states which expressly grants the prosecution an equal privilege of appeal with defendants in criminal cases.[19] Prior to that time the common law rule prevailed "that in all cases for matters criminal, in which the accused has been acquitted...he shall not again be put in jeopardy by a new trial granted upon the motion of the state or the public prosecutor."[20] Despite such precedent the Connecticut statute has frequently been held not to conflict with the double jeopardy doctrine.[21] The Connecticut court reasoned that criminal trial procedure can be altered t o secure just punishment as well as to protect the accused from unjust punishment; a person accused of crime has no "natural right of exemption from these regulations of a judicial proceeding which the State deems necessary...;" jeopardy rests at whatever point "the State, influenced by considerations of public policy, has decided to make such verdict, whether just or unjust, the end of that controversy...;" and that consequently so long as the time for appeal and subsequent proceedings has not lapsed "one jeopardy has not been exhausted."[22] Without reliance

upon the waiver doctrine, application of this rationale to the proposed procedure would provide sufficient basis for dismissing a double jeopardy claim. The State influenced by a public policy of reducing inequalities and lack of consistency in sentencing would thus be granting to convicted persons a right to seek review of excessive sentences within a period and by a procedure expressly authorized by statute. The State, deeming it necessary to prevent abuse of the procedure and to insure more just punishment , authorizes the review panel to increase a sentence following a hearing at which the accused is present.[23] A sentence would not become final until the appeal period passed without application by the prisoner. Thus any increase in sentence resulting from a valid application for review would occur before one jeopardy had been exhausted.

IV

Conclusion

Accepting the unpredictability of the courts in this area of the law, it seems safe to predict, so far as Connecticut is concerned, that an increase of sentence under the proposed review procedure would not be subject to a valid claim of double jeopardy. Whether tested by the objectives of the double jeopardy doctrine or by legal precedent, the primary reason -- one common to both tests -- is that since only the convicted person may seek review the procedure cannot be made a tool of harassment by the State. In initiating a review, which only Massachusetts has thus far made available, the prisoner accepts the very slight risk of increase of sentence imposed by the legislature. Possibly this explains the absence of any Massachusetts cases in which an increase of sentence has been challenged with a claim of double jeopardy.

Jcseph Goldstein
October 17, 1956

Footnotes to Appendix

1. Letter of September 24, 1956 from Chairman Patrick B. O'Sullivan to Executive Secretary Joseph Goldstein and Minutes of the Prison Study Committee, October 19, 1956.
2. Palko v. Conn., 302 U. S. 319 (1937); Francis v. Resweber, 329 U. S. 459, 463, (1947).
3. State v. Brown, 16 Conn. 54, 58 (1843); State v. Fox, 83 Conn. 286 (1910); State v. Carabetta, 106 Conn. 114 (1927).
4. Ex parte Lange, 85 U. S. (18 Wall.) 163 (1873).
5. Comment, 65 Yale L. J. 339, 340-341 (1956); Slovenko, The Law on Double Jeopardy, 30 Tulane L. R. 409 (1956).
6. State v. Carabetta, 106 Conn. 114, 117-118 (1927).
7. 65 Yale L. J. 339, 345 (1956).
8. 320 U. S. 264 (1943).
9. Id. at p. 276.
10. 282 U. S. 304, 311 (1931).
11. 85 U. S. (18 Wall.) 163, 167-174 (1873).
12. 282 U. S. 304, 307 (1931).
13. 85 U. S. (18 Wall.) 163, 175 (1873).
14. Palko v. Conn., 302 U. S. 319 (1937).
15. Indeed Lange may be read to hold just that and no more.
16. Francis v. Resweber, 329 U. S. 459, 462 (1946).
17. Green v. U. S., _____ F2d _____ (D. C. Cir. June 28, 1956).
18. Trono v. U. S., 199 U. S. 521, 533 (1905).
19. Conn. Gen. Stats., Sec. 8812 (1949 Rev.).
20. State v. Brown, 16 Conn. 54, 58 (1843).
21. State v. Lee, 65 Conn. 265, 271 (1894) (state appeals following acquittal of defendant on indictment of 2nd degree murder); State v. Muolo, 118 Conn. 373, 380 (1934) (state brings writ of error following dismissal of information charging defendant with unlawfully using taxi stand).
22. State v. Palko, 122 Conn. 529, 538 (1937); affirmed, Palko v. Conn., 302 U. S. 319 (1937).
23. State v. Lee, 65 Conn. 265, 272-274 (1894).
24. Though it is desirable that a hearing be required before imposition of an increased sentence, the absence of such a requirement would probably not invalidate the statute. Legislative dominance in the determination of sentence is well established and the constitutionality of an indeterminate sentence has been upheld, State v. Miglin, 101 Conn. 8 (1924), State v. Reilly, 94 Conn. 698 (1920). Sentences imposed by the trial judge are, within limits prescribed by the legislature, generally based on a pre-sentencing report, in formulation of which the prisoner ordinarily does not participate. Under the proposed procedure it is essentially this pre-sentencing report and its execution by the "very large discretion" of the trial judge, State v. Mele, 125 Conn. 210, (1939) which is being reviewed.